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ANTHONY KULANTHAI MARIE JOSEPH

v.

MALAYSIAN ASSURANCE ALLIANCE BHD

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COURT OF APPEAL, PUTRAJAYA
ABDULL HAMID EMBONG JCA
KN SEGARA JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEAL NO: W-02-815-2004]

C

21 NOVEMBER 2007

INSURANCE: *Life insurance - Trust of life policy in favour of wife - Action by wife to recover sum secured by policy - Whether action founded on contract or on trust - Whether action time-barred - Whether insurance*

D

company declared itself trustee of policy - Civil Law Act 1956, s. 23(1) - Limitation Act 1953, s. 22(1)(b)

TRUST: *Trusts - Life insurance policy - Trust of life policy in favour of wife - Action by wife to recover sum secured by policy - Whether action*

E

founded on contract or on trust - Whether action time-barred - Whether insurance company declared itself trustee of policy - Civil Law Act 1956, s. 23(1) - Limitation Act 1953, s. 22(1)(b)

LIMITATION: *Insurance policy - Trust of life policy in favour of wife - Action by wife to recover sum secured by policy - Whether action*

F

founded on contract or on trust - Whether action time-barred - Whether insurance company declared itself trustee of policy - Civil Law Act 1956, s. 23(1) - Limitation Act 1953, s. 22(1)(b)

This was an appeal by the plaintiff against the decision of the

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High Court dismissing her application by originating summons dated 4 June 2003 for the following declarations and orders: (i) a declaration that a policy of life insurance taken out by her husband, the insured, was valid as at 2 March 1993, the date of the insured's death; (ii) a declaration that the defendant insurance

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company was holding moneys payable under the insurance policy in trust for the plaintiff; and (iii) an order that the defendant do pay all moneys payable under the policy to the plaintiff. The defendant denied the plaintiff's claim on the following grounds: (a) that the relevant insurance policy had lapsed owing to the

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insured's failure to pay his premium at the time prescribed under the terms of the policy; and (b) that the plaintiff's action was time-barred by virtue of the Limitation Act 1953 ('LA'). The High Court judge found in favour of the defendant on both grounds

and dismissed the plaintiff's claim, resulting in the present appeal. At the very outset of this appeal, the defendant conceded that the policy of insurance had not lapsed at the date of death of the insured. Thus, there was only one issue to be determined by this court, namely, whether the plaintiff's action had been time-barred under the LA.

Held (allowing the appeal)
Per KN Segara JCA delivering the judgment of the court:

(1) The High Court judge had seriously misdirected himself in fact and in law when he held that the plaintiff's claim was founded on contract and that it was, accordingly, time-barred when her originating summons dated 4 June 2003 was filed in court more than six years after the date of death of her husband. The judge had his mind focused on s. 6(1)(a) of the LA. He erred in failing to consider that the wife's claim was, in fact and in law, a claim by her as a beneficiary (*cestui que* trust) of a policy effected under s. 23(1) of the Civil Law Act 1956 ('CLA'), creating a trust of the said policy of assurance immediately upon such a policy being effected. In this case, upon the death of the insured, the trust property (the sum secured by the policy) was never at any time handed over by the defendant to a trustee or trustees duly appointed under the provisions of s. 23 of the CLA, or in default of such appointment, to the legal personal representative. In such circumstances, the trust property remained in the hands of the defendant as a bare trustee right from the date of death of the insured. On the particular facts of this case, any action to recover the sum secured by the policy in the hands of the defendant as a bare trustee, by the *cestui que* trust and/or personal representative of the insured, was not an action founded on contract. (paras 13, 14 & 15)

(2) Looking at this case from another perspective, the defendant, for all intents and purposes, had declared itself a trustee of the policy. This was patent from a document that formed part of the insurance policy documents, which was signed by both the Chairman and General Manager/Registrar of the defendant. The insured, having accepted the defendant's declaration in the document to pay the insurance moneys directly to the beneficiary upon the death of the insured prior to the maturity date, must be deemed unequivocally to have appointed the defendant as a trustee. Such trustee would then be under an

obligation to pay the insurance moneys (trust property) to the beneficiary upon the death of the insured. If the said trustee fails to do so, any action instituted by the beneficiary would not be a claim in contract but a claim by the beneficiary under the trust to recover from the trustee trust property in the trustee's possession. Under such circumstances, no period of limitation prescribed by the LA shall apply to the said action by the beneficiary, consonant with the provisions of s. 22(1)(b) of the LA. (paras 16, 17 & 18)

(3) The plaintiff, in her capacity as the legal personal representative of the insured, as well as the *cestui que* trust of the policy pursuant to the provisions of s. 23 of the CLA, had no alternative but to file the originating summons seeking the declarations and orders set out therein. It would be inequitable, unconscionable and a gross injustice to allow the defendant to extinguish the right of the *cestui que* trust of a s. 23 CLA policy of insurance by invoking the purported limitation, when none existed. (para 19)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan plaintif terhadap keputusan Mahkamah Tinggi kerana menolak permohonan saman pemula bertarikh 4 Jun 2003 olehnya bagi mendapatkan deklarasi dan perintah berikut: (i) satu deklarasi bahawa polisi insurans nyawa yang diambil oleh suaminya, pengambil insurans, adalah sah setakat tarikh kematian pengambil insurans pada 2 Mac 1993; (ii) satu deklarasi bahawa penanggung insurans defendan memegang wang yang kena dibayar di bawah polisi insurans sebagai amanah untuk plaintif; dan (iii) satu perintah supaya defendan membayar kepada plaintif semua jumlah wang yang kena dibayar di bawah polisi tersebut. Defendan menafikan tuntutan plaintif atas alasan-alasan berikut: (a) bahawa polisi insurans telah luput disebabkan kegagalan pengambil insurans membayar premium menurut jadual yang ditetapkan di bawah terma-terma polisi; dan (b) bahawa tindakan plaintif dihalang oleh had masa di bawah Akta Had Masa 1953 ('LA'). Mahkamah Tinggi memutuskan dengan memihak kepada defendan atas kedua-dua alasan dan menolak tuntutan plaintif, sekaligus membangktikan rayuan di sini. Di permulaan rayuan, defendan mengakui bahawa polisi insurans tidak luput pada tarikh kematian pengambil insurans. Berikutan itu, hanya wujud satu isu yang perlu diputuskan oleh mahkamah ini, iaitu sama ada tindakan plaintif dihalang oleh had masa di bawah LA.

Diputuskan (membenarkan rayuan)
Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Hakim Mahkamah Tinggi telah dengan sangat seriusnya tersalah arah akan dirinya di sisi fakta dan undang-undang apabila memutuskan tuntutan plaintif adalah satu tindakan berasaskan kontrak, dan bahawa ianya dengan itu dihalang oleh had masa kerana saman pemula bertarikh 4 Jun 2003 difailkan di mahkamah lebih dari enam tahun selepas kematian suaminya. Perhatian hakim nampaknya terfokus kepada s. 6(1)(a) LA. Apapun, beliau khilaf kerana gagal menimbang bahawa tuntutan si isteri adalah, di atas fakta dan undang-undang, tuntutan oleh seorang benefisiari (*cestui que* trust) terhadap polisi yang dikuatkuasa di bawah 23(1) Akta Undang-Undang Sivil 1956 ('CLA'), yang mewujudkan suatu amanah terhadap polisi tersebut sebaik ianya dikuatkuasakan. Dalam kes semasa, ekoran kematian pengambil insurans, harta amanah (wang yang terkumpul di bawah polisi) tidak pernah pada bila-bila masa pun diserahkan oleh defendan kepada mana-mana pemegang amanah yang dilantik di bawah peruntukan s. 23 CLA, atau jika perlantikan tersebut tidak dibuat, kepada mana-mana wakil diri undang-undang si mati. Dalam halkeadaan sedemikian, harta amanah masih berada di tangan defendan sebagai bare trustee bermula dari tarikh kematian pengambil insurans. Berdasarkan fakta khusus kes, sebarang tindakan untuk mendapatkan kembali wang yang terkumpul di bawah polisi yang berada di tangan defendan selaku bare trustee, oleh *cestui que* trust dan/atau wakil diri undang-undang pengambil insurans, bukanlah satu tindakan yang berasaskan kontrak.

(2) Melihat kepada kes dari perspektifnya yang lain, defendan, bagi semua tujuan dan maksud, telah pun mengsiytiharkan dirinya sebagai pemegang amanah kepada polisi. Ini terserlah dari satu dokumen yang menjadi sebahagian dari dokumen-dokumen polisi insurans, yang ditandatangani oleh kedua-dua Pengerusi dan Pengurus Besar/Pendaftar defendan. Pengambil insurans, setelah menerima pengisytiharan defendan melalui dokumen tersebut untuk membayar wang insurans secara terus kepada benefisiari jika berlaku kematian pengambil insurans sebelum tarikh matang, hendaklah dengan tidak berbelah bagi dianggap sebagai telah melantik defendan sebagai pemegang amanah. Pemegang amanah sedemikian seterusnya berada di bawah tanggungan untuk membayar wang insurans (harta amanah)

kepada benefisiari apabila berlaku kematian pengambil insurans. Jika pemegang amanah tersebut gagal melakukannya, maka mana-mana tindakan yang dimulakan oleh benefisiari tidak menjadi satu tuntutan di dalam kontrak tetapi sebaliknya satu tuntutan oleh benefisiari di bawah amanah untuk mendapat kembali dari pemegang amanah harta amanah yang dipegang oleh pemegang amanah tersebut. Dalam keadaan sedemikian, selaras dengan peruntukan s. 22(1)(b) LA, tiada tempoh had masa seperti yang ditetapkan oleh LA terpakai kepada tindakan oleh benefisiari tersebut.

(3) Plaintiff, dalam kapasitinya sebagai wakil diri undang-undang pengambil insurans, dan *cestui que trust* polisi berdasarkan peruntukan s. 23 CLA, tidak mempunyai pilihan melainkan untuk memfailkan saman pemula menuntut deklarasi dan perintah-perintah di sini. Adalah tidak berekuiti, tidak berhati budi dan satu ketidakadilan yang nyata untuk membenarkan defendan menghapuskan hak *cestui que* trust kepada satu polisi s. 23 CLA dengan menguatkuasakan had masa sedangkan had masa itu langsung tidak wujud.

Legislation referred to:
Civil Law Act 1956, s. 23(1), (2)
Limitation Act 1953, ss. 6(1)(a), 22(1)(b)

For the appellant - Murali Achan (K Kulasekar with him); M/s K Kulasekar Achan & Assoc
For the respondent - Ho Kee Tong; M/s Gan, Ho & Razlan Hadri

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S2-24-992-2003]

Reported by Suresh Nathan

JUDGMENT

KN Segara JCA:

[1] Martin Raj a/l Anthony Selvaraj applied for a life insurance on his own life for the sum of RM50,000 in a plan of insurance called Executive Master Plan with Malaysian Assurance Alliance Berhad (MAAB) on 10 June 1992. In his proposal form he named his wife Anthony Kolanthai Marie Joseph as his beneficiary. On 12 June 1992 (policy date) MAAB issued Policy No. M922849094 (policy) to the insured Martin Raj a/l Anthony Selvaraj with the maturity date/expiry date on 12 June 2052. On the policy information page the applicant/owner was expressed as Martin Raj a/l Anthony Selvaraj and the face amount was RM50,000. The total first monthly premium was RM166.53.

[2] Premiums are payable on the policy date and every one month thereafter during the lifetime of the insured, as provided in the "Schedule of Benefits and Premiums" of the policy information page (p. 78 rekod rayuan).

ENDORSEMENT 1. of the policy reads, *inter alia*:

a. This Policy is effected under "Section 23 of the Civil Law Ordinance of the Federation of Malaya" for the benefit of the beneficiary/beneficiaries as stated in the Application Form.

The insured hereby appoints himself or herself or the Trustees as stated in the "Appointment of Trustees" Form to be Trustees of all money payable hereunder.

b. It is hereby agreed that the provisions of this Policy under "Ownership Provisions" be cancelled in its entirety and shall be substituted by the following:

All rights, privileges and options under this contract shall be reserved to the Tustees alone.

[3] The relevant provisions of the said sections of the Civil Law Act 1956 (CLA) reads:

23.(1) A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife or … shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not as long as any object of the trust remains unperformed form part of the estate of the insured …

(3) **The insured may by the policy** or any memorandum under his or her hand **appoint a trustee** or trustees **of the moneys payable under the policy,** and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof and for the investment of the moneys payable under any such policy.

(4) In default of any such appointment of a trustee the policy immediately on its being effected shall vest in the insured and his or her legal personal representatives in trust for the purposes aforesaid.

[4] There is no dispute that the policy of assurance M922849094 effected by Martin Raj a/l Anthony Selvaraj (insured) on his own life and expressed to be for the benefit of his wife

Anthony Kolanthai Marie Joseph was a policy of assurance falling squarely under s. 23(1) CLA which created a statutory trust in favour of the wife (*cestui que* trust).

[5] The insured died on 2 March 1993 as a result of a "myocardial infraction." By letter dated 24 July 1995 MAAB wrote to solicitors, M/s Ganaendrah & Associates, that no claim can be admitted on the policy as the policy taken out on 12/6/92 had lapsed on 12 January 1993 as the "1st year 8th monthly premium of RM166.53 had not been remitted to us." There was no evidence that the insured had been notified by MAAB that the policy had lapsed at any time before his death on 2 March 1993. Upon being informed that no claim could be admitted on the policy on the purported ground that it had lapsed on 12 January 1993, the wife caused investigations to be made and based on the payment history on the policy, supplied by computer print out, the last installment payment received by MAAB was on 2 February 1993. The payment history revealed as follows:

	Payment Dates	Due Dates
a.	1/8/1992	12/8/1992
b.	1/10/1992	12/9/1992
c.	24/10/1992	12/10/1992
d.	24/12/1992	12/11/1992
e.	2/2/1993	12/12/1992

[6] The policy, under the premium provisions in respect of payment of premiums and grace period, provides, *inter alia*, as follows:

> **Default** – After payment of the first premium, failure to pay a premium on or before its due date to the Company will constitute a default in payment of the premium.
>
> **Grace Period** – A Grace Period of thirty-one days from its due date will be allowed for payment of each premium after the first during which period this Policy will remain in force. If any premium remains unpaid at the end of its Grace Period, the Policy shall lapse and have no further value except as may be provided under the NON-FORFEITURE PROVISIONS.

Deduction of Premiums at Death – If this Policy becomes a claim by death of the insured, any unpaid balance of the premiums due for the full Policy Year in which death occurs shall be deducted from the proceeds payable under the Policy.

[7] Looking at the payment history above, it would appear that there was a failure by the insured to pay the premium on the due dates for the months of September, October, November and December 1992. The payment of the premium for the month of August 1992 was paid earlier than the due date of "12 August 1992" as it was paid on 1 August 1992. Nevertheless, in respect of the payment of the premium for the month of September 1992 and October 1992, it was paid within the "Grace Period". The policy therefore remained in force until the next premium due on 12 November 1992 plus another 31 days (for the "Grace Period"). However, the premium for the month of November 1992 paid on 24 December 1992 was clearly paid out of the "Grace Period". The said premium ought not to have been received as the policy had lapsed. Nevertheless, since the said premium was received unconditionally, the policy must remain in force on 24 December 1992. The next payment was made on 2 February 1993. Again, this payment was accepted unconditionally. Since it was accepted unconditionally it follows that MAAB has acknowledged, unequivocally, that the policy remained in force as at 2 February 1993.

[8] MAAB, by accepting the payment of the premiums after the due date plus the grace period, in December 1992 and February 1993, had clearly waived the requirement of strict adherence to the payment terms, in particular, the terms as to the intervals within which payment of the premium is to be made. It is settled law, that acceptance of performance of a contract outside the time prescribed in the contract, renders time no longer to be the essence of the contract. Since MAAB accepted the premium outside the grace period, time was no longer the essence of the contract. If MAAB wished to insist on the payment of premium within a period of time, then it ought to have given notice to the insured to reinstate time to be of the essence of the contract, after it had received the payment on 2 February 1993 from the insured. Since MAAB had by its conduct implicitly elected not to make time the essence of the contract at any period between 2 February 1993 and the date of death of the insured on 2 March 1993 and call for payment all outstanding premiums as at

2 February 1993, then MAAB's option would clearly be to exercise its rights, in the event the policy becomes a claim by death, under the provisions of the policy which reads:

> Deduction of Premiums at Death – If this Policy becomes a claim by death of the insured, any unpaid balance of the premiums due for the full Policy Year in which death occurs shall be deducted from the proceeds payable under the Policy.

[9] It is inequitable for MAAB to accept premium payments unconditionally from the insured during his lifetime, and then after the death of the insured attempt to avoid the policy by contending the policy had lapsed, at the date of death, on the ground that the insured had defaulted in payment of a premium on or before its due date plus 31 days (grace period). In the above circumstances, the wife of the deceased insured (plaintiff) applied to the High Court by originating summons dated 4 June 2003 seeking the following declaration and orders:

a) a declaration that the policy of life insurance No. 9228490094 taken out by Martin Raj a/l Anthony Selvaraj, the insured, was valid as at 2 March 1993;

b) a declaration that MAAB (defendant) is holding moneys payable under the insurance policy in trust for the plaintiff;

c) an order that the defendant do pay all moneys payable under the policy to the plaintiff.

[10] The defendant denied the plaintiff's claim on the following grounds:

a) that the relevant insurance policy had lapsed owing to the insured's failure to pay his premium at the time prescribed under the terms of the policy;

b) that the plaintiff's action is time barred by virtue of the Limitation Act 1953 (LA 1953).

[11] The learned High Court Judge found in favour of the defendant on both grounds and dismissed the plaintiff's originating summons and hence this present appeal before us by the plaintiff. For convenience, the appellant and respondent before us shall be referred to as, the plaintiff and defendant, respectively, in this judgment.

[12] At the very outset of this appeal, counsel for the defendant conceded that the policy of insurance had not lapsed at the date of death of the insured. Therefore, there was only one issue to be determined by this court, namely, whether the plaintiff's action had been time barred under LA 1953. In this regard, the learned High Court Judge held in his grounds of judgment:

> Alasan utama saya menolak tuntutan Plaintif itu ialah oleh sebab tindakan Plaintif ini dimulakan selepas 6 tahun dari tarikh kematian simati iaitu tarikh bermulanya kuasa tindakan ini. Simati meninggal dunia pada 2/3/1993. Tindakan Plaintif ini difailkan di Mahkamah pada 16/7/2004 lebih dari 11 tahun. Polisi insuran yang dibuat oleh simati dengan Defendan adalah merupakan satu jenis kontrak. Had masa untuk mengambil tindakan terhadap apa-apa kontrak ialah dalam masa 6 tahun. Di dalam tindakan ini tindakan Plaintif dibuat lebih dari 11 tahun. Tidak ada apa-apa alasan diberi oleh Plaintif mengapa kelewatan dilakukan untuk memulakan tindakan. Di atas alasan ini sahaja tindakan Plaintif wajar ditolak.

[13] The learned High Court Judge has seriously misdirected himself on the facts and the law when he held that the claim of the plaintiff was founded on contract, and was accordingly time barred when her originating summons, dated 4 June 2003, was filed in court more than six years after the date of death of her husband. The learned judge had his mind focused on s. 6(1)(a) of LA 1953. He fell seriously in error in assuming the claim was an action founded on a contract. Section 6(1)(a) LA 1953 provides:

> Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (a) actions founded on a contract or on tort;
>
> …

[14] He erred in failing to consider that the claim of the wife was, in fact and in law, a claim by her as a beneficiary (*cestui que* trust) of a policy effected under s. 23(1) CLA creating a trust of the said policy of assurance immediately such a policy is effected.

[15] In this case, upon the death of the insured, the trust property (the sum secured by the policy) was never at any time handed over by the defendant to a trustee or trustees duly appointed under the provisions of s. 23 CLA or in default of such appointment, to the legal personal representative. In such circumstances, in law and in fact, the trust property (the sum

secured by the policy) remained in the hands of the defendant as a bare trustee right from the date of death of the insured. On the particular facts of this case, any action to recover the sum secured by the policy in the hands of the defendant as bare trustee, by the *cestui que* trust and/or personal representative of the insured, is not an action founded on contract.

[16] The factual matrix of this case can also be looked at from another perspective. The defendant, for all intents and purposes, had declared itself a trustee of the policy. This is patent from a document that formed part of the insurance policy documents. The document was signed by both, the Chairman, as well as the General Manager/Registrar of the defendant (p. 77 rekod rayuan). The document contains the following declaration:

> MALAYSIAN ASSURANCE ALLIANCE BERHAD will pay upon surrender of this Policy and subject to its provision,
>
> (1) The Face Amount to the Owner if the Insured is then alive on the Maturity Date.
>
> (2) The Face Amount to the Beneficiary upon the death of the Insured prior to the 'Maturity Date' provided that due proof of such death is furnished in form specified by the Company.
>
> MALAYSIAN ASSURANCE ALLIANCE BERHAD has caused this Policy to be issued on the Issue Date.

[17] This declaration was obviously made with the consent of the insured. It would appear that this very document is also evidence that the insured had appointed a trustee (that is, the defendant) consistent with s. 23(2) CLA which reads:

> The insured may by the policy … appoint a trustee … of the moneys payable under the policy, …

[18] The insured, having accepted the defendant's declaration to pay the insurance moneys directly to the beneficiary, upon the death of the insured prior to the maturity date, the insured must be deemed unequivocally to have appointed the defendant as trustee. Such trustee would then be under an obligation to pay the insurance moneys (trust property) to the beneficiary upon the death of the insured. If the said trustee fails to do so, any action instituted by the beneficiary would not be a claim in contract but a claim by the beneficiary under the trust to recover from the

trustee trust property, in the possession of the trustee. Under such circumstances, no period of limitation prescribed by the LA 1953 shall apply to the said action by the beneficiary, consonant with the provisions of s. 22(1)(b) LA 1953 which reads:

> 22(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action:
>
> (a) …
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, …

[19] The plaintiff, in her capacity as the legal personal representative of the insured, as well as the *cestui que* trust of the policy pursuant to the provisions of s. 23 CLA, had no alternative but to file the originating summons seeking the declarations and orders set out therein. It would be inequitable, unconscionable and a gross injustice to allow the defendant to extinguish the right of the *cestui que* trust of a s. 23 CLA policy of insurance, by invoking the purported limitation, when none exists.

[20] In the above circumstances, we are unanimous that this appeal is allowed in terms of prayer a), b) and c) of the originating summons dated 4 June 2003, that is:

> a. Suatu deklarasi bahawa polisi insuran seumur hidup No.M922849094 yang diambil oleh Martin Raj a/l Anthony Selavaraj, simati, adalah sah pada 2-3-1993.
>
> b. Suatu deklarasi bahawa Defendan memegang jumlah yang kena dibayar dibawah polisi insuran tersebut sebagai amanah bagi pihak estet simati dan/atau Plaintif.
>
> c. Defendan membayar Plaintif jumlah yang kena dibayar di bawah polisi insuran tersebut kepada Plaintif bersama dengan faedah pada kadar 8% dari 2-3-1993 sehingga pembayaran penuh.

[21] The plaintiff shall be entitled to the costs in the court below. By consent the costs of the appeal to the plaintiff in the Court of Appeal is agreed at RM5,000. The deposit shall be refunded to the appellant.